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IN THE

Supreme Court of the United States

MAINSTREET ORGANIZATION OF REALTORS, SUCCESSOR BY NAME CHANGE TO REALTOR ASSOCIATION OF WEST/SOUTH SUBURBAN CHICAGOLAND,

Petitioner,

v.

CALUMET CITY, ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition where the Seventh Circuit's Opinion finding that Petitioner did not possess standing to challenge the constitutionality of Respondent's Point-of-Sale Inspection Ordinance and reversing the District Court's granting of a preliminary injunction enjoining enforcement of the Point-of-Sale Ordinance was correct and does not conflict with a decision of this Court or a Court of Appeals, and where Petitioner does not claim or establish that the Seventh Circuit's ruling implicates an important federal question that has not been settled by this Court.

II. Whether Petitioner has presented compelling reasons to grant the Petition where the Seventh Circuit's *sua sponte* consideration of Petitioner's standing, including prudential standing, to bring this action challenging the constitutionality of Respondent's Point-of-Sale Ordinance was correct and does not conflict with a decision of this Court or a Court of Appeals, and where Petitioner does not claim or establish that the Seventh Circuit's *sua sponte* consideration of standing, including prudential standing, implicates an important federal question that has not been settled by this Court.

III. Whether Petitioner has presented compelling reasons to grant the Petition where the Seventh Circuit's denial of Petitioner's request to submit supplemental briefs on the issue of its standing,

including prudential standing, after the Seventh Circuit properly raised the issue *sua sponte*, was correct and does not conflict with a decision of this Court or a Court of Appeals, and where Petitioner does not claim or establish that the Seventh Circuit's ruling implicates an important federal question that has not been settled by this Court.

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OBJECTIONS TO JURISDICTION IN THIS COURT

On October 17, 2007, the Seventh Circuit determined that Petitioner ("the Association") did not have prudential standing to bring this challenge to the constitutionality of Respondent's ("City's") Point-of-Sale Inspection Ordinance. The Seventh Circuit reversed the District Court, vacating the preliminary injunction against enforcement of the ordinance and dismissing the suit without prejudice. Accordingly, Petitioner lacks standing to pursue the writ of *certiorari*, and this Court lacks jurisdiction. Additionally, as noted in the concurring opinion of Justice Sykes in the Seventh Circuit, Petitioner has not met its burden of demonstrating that it has Article III standing in this matter. Pet. App. 15-26. There is no jurisdictional basis for this Court to consider or grant the Petition.

COUNTER STATEMENT OF THE CASE

Petitioner is an association of Chicago-area real estate brokers which brought suit in the Unites States District Court for the Northern District of Illinois challenging the constitutionality of a Point-of-Sale Inspection Ordinance ("ordinance"), adopted by Calumet City, Illinois. The ordinance specifically requires that upon the sale of a house within the City, the seller/owner must obtain an inspection of the house to determine whether it is in compliance with the City's building and zoning codes. The City's issuance of a real estate transfer stamp is conditioned on the house being in compliance with the relevant codes, among other conditions. If the house is not in compliance, the house

must be brought into compliance with the code. One of the primary objectives of the ordinance is to prevent the surreptitious conversion of single-family houses to multi-family dwellings and to mitigate the physical deterioration of the housing stock within the City. As recognized by the Seventh Circuit's opinion in this case, such municipal ordinances are common.

The Association filed its complaint on April 24, 2006, seeking declaratory and injunctive relief against enforcement of the ordinance against City homeowners, among other remedies. In response to the Association's lawsuit, the City moved to dismiss its claims on several grounds. Among the arguments raised by the City was an objection to the Association's standing in the District Court to challenge the ordinance on behalf of homeowners who were not members of the Association.

While the matter was proceeding before the District Court, the City amended the ordinance. Pet. App., 38-51. The amendments, however, did not result in an end of the litigation, and as a result of motion practice before the District Court, the Association's remaining claim alleged that the ordinance deprived the homeowners of their property without due process of law. The District Court found that the Association did have standing to sue the City, and the court granted the Association's request for a preliminary injunction and enjoined the City's enforcement of the ordinance. Pet. App., 33-35. The City appealed the granting of the injunction to the Seventh Circuit Court of Appeals.

At oral argument on September 7, 2007, a three-judge panel of the Seventh Circuit Court of Appeals questioned both counsel, whether the Association had prudential standing to bring a suit to enjoin enforcement of an ordinance directly affecting City homeowners. The following colloquy took place during oral argument between the Association's counsel and the court:

> "MR. STAHL [Association's counsel]: But I'd like to address the standing point because I think we can straighten this out.
>
> * * *
>
> MR. STAHL: This was all completely and fully addressed by [the District Court] –
>
> THE COURT: It was not fully addressed. As far as the papers I've seen has one sentence on it and anyway if he discussed it, you know, in a thousand pages we have to make an independent decision. Do you have standing?
>
> MR. STAHL: Well, in the context in which this comes up though the only standing issue that was raised by Cal. City –
>
> THE COURT: The standing is jurisdictional even this prudential standing or at least, you know, we can certainly raise it on our own initiative even if it's not argued by

> the defendant because it is very – and as he points out if we had a real seller here owner we would have a better sense of the factual dimensions of this.
>
> MR. STAHL: I'd like to go to that too. The factual dimensions of this, whether there is an appeal, how long it takes, all of that can and will be fully addressed if it's [inaudible] to what the City's going to argue before we get to a judgment on the merits. Here we are on a preliminary injunction –
>
> THE COURT: You still have to have standing." Transcript Oral Argument, September 7, 2007.

Prior to the Seventh Circuit rendering its decision, the Association filed a Motion for Leave to Inform the Court of Material Developments in the District Court and to File a Supplemental Brief. In the body of the motion, citing legal authority, the Association requested leave to file supplemental briefs on the issue of standing.

The Seventh Circuit ultimately held, without expressing any opinion as to the merits, that it could consider the issue of prudential standing irrespective of the parties' arguments or concessions. Pet. App., 1-28. The court further held that the Association and its members did not have standing to challenge a law that might impede the sale of property they would like to broker. According to the court, the Association and its members did not have a constitutionally protected interest in more or higher commissions and their claims

were simply too remote to satisfy prudential standing concepts. While two of the judges agreed that the Association satisfied Article III standing but lacked prudential standing, the concurring opinion by Judge Sykes concluded that the Association lacked both Article III standing and prudential standing. Pet. App., 15-26.

After the Seventh Circuit issued its opinion, the Association filed petitions for rehearing and for rehearing *en banc*. Both petitions were denied, and the Association filed its Petition in this Court. Pet. App., 36-37.

In October 2007, Ayanna Walker, alleging to be a Calumet City homeowner, filed a complaint for declaratory and injunctive relief against the City challenging the constitutionality of the ordinance. Walker is represented by the Association's attorneys, and she raises similar claims. The Walker litigation is currently pending in the District Court for the Northern District of Illinois. Litigation regarding the constitutionality of the ordinance will continue even assuming the Association's Petition is denied. Additionally, the City has amended the challenged ordinance multiple times since the inception of the present litigation. The fourth version of the ordinance is at issue in the Walker litigation. Prior to the Seventh Circuit rendering its decision here, the Association notified the court of the Walker lawsuit as part of its motion to file supplemental briefs. Pet. App., 31-32.

REASONS FOR DENYING THE PETITION

The Seventh Circuit's decisions in this matter do not conflict with the holdings of this Court or any Court of Appeal. Nor do they implicate a federal question that has not been decided. The Association, therefore, has not met its burden of demonstrating "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10. The City begins by first addressing the argument raised in section II of the Petition, *i.e.*, whether federal courts may address prudential standing *sua sponte*.

I. Prudential standing is a threshold determinant of jurisdiction and courts accordingly may address the matter *sua sponte*.

In its Petition (section II), the Association claims that this Court has never addressed the right of a federal reviewing court to raise, *sua sponte*, the issue of prudential standing. The Association also claims that there is a purported split in the federal circuits on this issue. It seeks a declaration from this Court that reviewing courts may not address prudential standing where (1) the parties have not raised the issue or (2) have conceded it. Such a rule, however, would contradict established jurisdictional principles. Prudential standing is an aspect of the federal court's jurisdiction over legal disputes, and accordingly, courts may raise it at any time. The Association's proposed "waiver" rule ignores decades of jurisprudence, and its petition must therefore be denied.

A. Prudential standing is an aspect of jurisdiction and accordingly courts have a duty to consider a party's standing *sua sponte*.

Like Article III standing, this Court has recognized that prudential standing is a "threshold" matter that all courts must consider in an assessment of their own jurisdiction. Contrary to the Association's assertions, all federal courts are obligated, *sua sponte*, to consider whether claimants possess prudential standing as a threshold matter before proceeding to the merits of a particular issue. This Court stated in *Warth v. Seldin*:

> "The rules of standing, whether as aspects of the Art. III case-or-controversy requirement or as reflections of prudential considerations defining and limiting the role of the courts, are threshold determinants of the propriety of judicial intervention. It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth v. Seldin*, 422 U.S. 490, 517-18 (1975).

In other words, it was the Association's responsibility to allege sufficient facts demonstrating that it had standing to invoke the court's jurisdiction and exercise of remedial powers. It was the Seventh Circuit's responsibility to determine whether the Association met that burden. In *Mansfield C. & L.M.R. Co. v. Swan*, this

Court defined its role in assessing its own jurisdiction, stating:

> "[T]he rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." *Swan*, 111 U.S. 379, 382 (1884).

Furthermore, standing, whether Article III or prudential in nature, must be satisfied at all times throughout the litigation. *Arizonans for Official English v. Arizona*, 520 U.S. 43, n. 22 (1997). Accordingly, whether or not the parties raise the issue of standing on appeal, federal courts, as a threshold matter, possess a duty to assess their own jurisdiction *sua sponte*.

The Association proposes to distinguish Article III standing from prudential standing, *i.e.*, making prudential standing comparable to an affirmative

defense that must be raised by a party or waived. However, neither this Court nor any appellate courts have ever so characterized prudential standing. In *Warth*, as quoted above, the Court discussed Article III and prudential considerations collectively in identifying standing as a "threshold determinant of the propriety of judicial intervention." *Warth*, 422 U.S. at 517-18. Contrary to the Association's contention, this Court has consistently recognized the duty of all federal courts to examine standing as an aspect of their own jurisdiction. This judicial duty or power is not affected in any way by the agreements or concessions of the parties. The Seventh Circuit specifically recognized this during oral argument when one of the justices warned counsel for the Association that "the City's concession doesn't bind us so you can forget about that line of argument." Transcript of Oral Argument, September 7, 2007. If parties could affect their standing by agreement or concession, then the jurisdiction of the federal courts, including the Supreme Court, could be subject to the whims of the parties.

The Association relies on *Arizona v. California*, 530 U.S. 392 (2000), and *United States v. Burke*, 504 U.S. 229 (1992), to support its argument that prudential standing should be subject to waiver like any affirmative defense. Neither opinion, however, compared standing principles with affirmative defenses. In fact, the Court did not discuss jurisdictional issues in either case. In *Arizona*, addressing a water rights dispute, the Court held that "issue preclusion" and "res judicata" arguments were affirmative defenses subject to waiver. *Arizona*, 530 U.S. at 412-13.

In *Burke*, the Court held that back pay awards received in the settlement of Title VII claims were not "personal injury damages" for purposes of statutory tax exemptions. *Burke*, 504 U.S. at 242. The Association, in fact, only quotes a concurring opinion from *Burke* in which Justice Scalia cites the well-accepted principle that courts generally should not address issues not raised by the parties. *Burke*, 504 U.S. at 246.

The *Arizona* and *Burke* opinions have no bearing on the issue of prudential standing. Neither opinion addressed standing or analyzed the purported similarities between prudential standing and affirmative defenses. The Association is urging this Court to establish a new principle, *i.e.*, that prudential standing be separated from its jurisdictional foundations and converted to a litigation defense to be raised or waived by litigants. This would contradict years of Supreme Court jurisprudence.

Finally, in footnote 1 of its petition, the Association contends that the Court has sent out "mixed signals" as to whether or not waiver of prudential standing is "permissible," relying on *Craig v. Boren*, 429 U.S. 190, 192-94 (1976). The Association, however, mischaracterizes the *Craig* Court's treatment of prudential standing. The *Craig* Court did not reject as untimely an objection to the appellant's prudential standing. In fact, in *Craig*, neither party raised the issue of standing – constitutional or prudential. Unlike in the present case, the issue was not raised in the lower courts or before the Supreme Court. The opinion suggests that the *Craig* Court raised the issue itself, as it should, as

part of its threshold determination of standing. *Craig*, 429 U.S. at 192-94. Contrary to the Association's assertions, nothing in the *Craig* decision is at odds with the decision in *Bender v. Williamsport Area School District*, 475 U.S. 534, 546 (1986). The *Craig* case supports the decision of the Seventh Circuit here.

B. Even if prudential standing is not jurisdictional in the constitutional sense, allowing courts to raise the issue *sua sponte* is consistent with the federal courts' authority to raise, *sua sponte*, abstention and other matters affecting justiciability.

There is no reason to treat the doctrine of prudential standing differently from other doctrines federal courts may raise *sua sponte*, such as abstention, in considering whether to exercise their jurisdiction. The Seventh Circuit made this analogy in finding that plaintiff lacked prudential standing. Pet. App., 11. Federal courts may abstain from exercising jurisdiction over a particular matter under *Younger v. Harris*, 401 U.S. 37, 53 (1971), and *Railroad Commission of Texas v. Pullman*, 312 U.S. 496, 499-501 (1941), even where Article III standing is satisfied and a case or controversy is properly before the court. *Murray v. Carrier*, 477 U.S. 478 (1986) *citing Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976). This Court has further held that *Younger* and *Pullman* abstention, which are based on principles of comity and Federalism, may be raised *sua sponte*. *Bellotti v. Baird*, 428 U.S. 132, 143, n. 10 (1976). This Court has stated, "[t]he doctrine of abstention . . . is an extraordinary and narrow exception

to the duty of a District Court to adjudicate a controversy properly before it." *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959).

Prudential standing objectives are similarly "founded in concern about the proper-and properly limited-role of the courts in a democratic society." *Warth v Seldin*, 422 U.S. at 498. Accordingly, in *Tenet v. Doe*, Chief Justice Rehnquist noted that the concept of standing serves an objective at least as important as those served by the various doctrines of abstention developed by the Court. *Tenet v. Doe*, 544 U.S. 1, 6, n. 4 (2005). The Seventh Circuit recognized the similarity between the two doctrines in the present case, and correctly held that it was appropriate to address standing even though neither party specifically raised the issue in their appellate briefs. The same reasons that justify the courts raising abstention *sua sponte* also justify the raising of prudential standing even if it is not argued by the parties.

C. There is no split among the federal circuits on the issue of addressing prudential standing *sua sponte*.

The Association further contends that there is a split among the federal circuits regarding whether a reviewing court may raise *sua sponte* the issue of prudential standing. The Association readily admits that the Second, Sixth, and District of Columbia Circuits have held that federal courts may raise prudential standing issues on their own motion, but contends that the Seventh and Ninth Circuits have held otherwise. The Association, however, has misinterpreted the Seventh

Circuit cases upon which it relies and an accurate reading of the cases reveals that there is no split in the circuits on this issue. Significantly, the Seventh Circuit clearly held in this case that federal courts may consider prudential issues on their own motion irrespective of the parties' arguments.

1. The Seventh Circuit's decision in this case is consistent with its prior decisions.

Attempting to manufacture an ambiguity in the Seventh Circuit's position on this issue, the Association relies on *Lindley v. Sullivan*, 889 F.2d 124 (7th Cir. 1989). In *Lindley*, the Secretary of Health and Human Services denied an adopted child "child insurance benefits" under the Social Security Act. *Lindley*, 889 F.2d at 127. The child's father, himself a recipient of social security disability benefits, filed a lawsuit on behalf of his son challenging the Secretary's decision, in part, as a violation of his and his wife's equal protection rights. *Lindley*, 889 F.2d at 127. After the district court upheld the Secretary's denial of benefits, the Secretary, for the first time on appeal, argued that the "third-party standing" doctrine barred the child from essentially asserting his parents' interest in the insurance benefits. The Seventh Circuit Court of Appeals declared, "We are obliged to address [the child's] standing because it is a predicate to our subject matter jurisdiction here." *Lindley*, 889 F.2d at 128. Having first found that the child satisfied Article III standing, the Court then stated, "[b]ecause the Secretary failed to suggest in the district court that prudential considerations should bar [the child] from suing on his parents' behalf, we cannot consider the arguments here," citing *Craig v. Boren*,

429 U.S. at 193-94. *Lindley*, 889 F.2d at 129. The Association's reliance on *Lindley* focuses entirely on this single sentence.

In the present case, however, the Seventh Circuit specifically addressed *Lindley* and clarified that it did not intend to absolutely bar judicial consideration of prudential standing where the parties had not raised the issue.[1] The Seventh Circuit explained that it only meant that a party's failure to raise standing might serve as a ground for courts to decline to consider prudential considerations. The Seventh Circuit's holding is consistent with the Supreme Court's opinion in *Craig v. Boren*, 429 U.S. at 193-94, which also held that the failure to invoke the doctrine of prudential standing is merely a ground for courts to refuse to consider the doctrine and not an absolute bar to its consideration. As noted by Judge Posner in this case, the *Lindley* court, in fact, proceeded to address whether prudential standing considerations were satisfied in spite of the statement that the issue was waived. Pet. App., 13.

The Association also relies on two other Seventh Circuit opinions that cite *Lindley* for the proposition that prudential standing cannot be considered if not raised by a party. *See MacLauchlan v. Prudential Insurance Co. of America*, 970 F.2d 357, 359 (7th Cir. 1992); and *United Transportation Board v. Surface Transportation Board*, 183 F.3d 606, 610-11 (7th Cir. 1999). In *United Transportation*, as in *Lindley*, the

1. As discussed in the Counter Statement of the Case and below, the record establishes that the City did challenge the Association's standing in the district court.

Seventh Circuit first stated that the defendant waived the issue of standing but then proceeded to immediately consider whether the requirements of prudential standing were satisfied. *United Transportation*, 183 F.3d at 611. Addressing this aspect of its opinion in *United Transportation*, the Seventh Circuit in the present case again clarified that it was merely holding that prudential considerations could be "waived" and not that a failure to raise the issue was an absolute bar to its consideration. Pet. App., 14. As noted above, the *United Transportation* court, in fact, proceeded to reach the issue in spite of the stated "waiver." *United Transportation*, 183 F.3d at 611.

Similarly, the Seventh Circuit has directly undermined the Association's reliance on *MacLauchlin*. In a footnote, the *MacLauchlin* court stated, "We may not raise prudential standing *sua sponte*." *MacLauchlin*, 970 F.2d at 359, n.1. Once again, in the present case, Judge Posner and the Seventh Circuit specifically addressed the Association's reliance on this statement. The Court identified this language as "dictum" as opposed to a "holding." According to the Seventh Circuit, the *MacLauchlin* case was unusual in the sense that the district court rejected the suit on its merits without first assessing whether the plaintiff possessed a right to sue in the first place. Pet. App., 14. Because the Seventh Circuit agreed that the underlying case and appeal were meritless, a detailed analysis of prudential standing issues would have only delayed the obvious need to dismiss the case on its merits.

Accordingly, the Seventh Circuit has specifically disagreed with the Association's interpretation of

Seventh Circuit precedent. The decision in this case is the most recent and most extensive explanation of the Seventh Circuit's position on prudential standing and waiver. Here the Seventh Circuit has definitively declared that prudential standing may be raised *sua sponte*.

2. The Seventh Circuit's position is consistent with the holdings of other federal circuits.

The Seventh Circuit specifically noted that its holding was consistent with several other federal circuits, *citing Delorme v. United States*, 354 F.3d 810, 815 (8th Cir. 2004); *American Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1357-58 (D.C. Cir. 2000); *Community First Bank v. National Credit Union Administration*, 41 F.3d 1050, 1053 (D.C. Cir. 1994) (prudential standing is a "qualifying hurdle that plaintiffs must satisfy even if raised *sua sponte* by the court"); *Thompson v. County of Franklin*, 15 F.3d 245-247-49 (2d Cir. 1994) ("[t]he concept of standing-even its prudential dimension-is a limitation on federal court jurisdiction").

Still other opinions, not cited by the Seventh Circuit, are also in agreement with its holding in this case. *Davis v. Blackburn*, 803 F.2d 1371 (5th Cir. 1986) (holding that while prudential standing is not jurisdictional, it is as important as Article III standing and may be raised by courts *sua sponte*), *citing Tileston v. Ullman*, 318 U.S. 44 (1943); *Legal Defense Fund v. Espy*, 23 F.3d 496-99 (D.C. Cir. 1994); *Steffan v. Perry*, 41 F.3d 677, 697, n. 20 (D.C. Cir. 1994) (*en banc*). The Association does not

contest that the opinions of these circuits supports the decision here.

Contrary to the Association's contentions, the decisions of Ninth Circuit do not establish a rule of absolute waiver with respect to prudential standing. The Association primarily relies on *Pershing Park Villas Homeowners Ass'n v. United Pacific Ins. Co.*, 219 F.3d 895 (9th Cir. 2000). The Association incorrectly relies on this opinion to suggest that, in the Ninth Circuit, a failure to raise prudential standing constitutes an absolute waiver of its consideration. In fact, the ruling in *Pershing Park* comports completely with the Seventh Circuit's prior opinions – that a party's failure to raise the issue of prudential standing *may* constitute a waiver; whether the issue is waived is within the court's discretion.

In *Pershing Park*, a party raised the issue of prudential standing at a motion in limine conference on the eve of trial - after significant discovery had been completed. *Pershing Park*, 219 F.3d at 898-99. The district court viewed this effort as strategic and ruled that the issue had been waived. *Pershing Park*, 219 F.3d at 900. On appeal to the Ninth Circuit, the court – similar to the Seventh Circuit – held that whether or not the issue of prudential standing can be waived is a matter within the court's sound discretion. The *Pershing Park* court stated, "The district court did not abuse its discretion in determining that [the defendant] waived any objections to the developers' third-party standing

to assert those claims." *Pershing Park*, 219 F.3d at 901. The court also noted, in a footnote, that

> "[o]ur conclusion that debtor standing is ordinarily prudential comports with our decision in *Sierra Switchboard Co. v. Westinghouse Elec. Corp.*, 789 F.2d 705, 708, n. 1 (9th Cir. 1986), where we treated the decision to hear an untimely objection to a debtor's standing as implicating our discretion to hear purely legal issues not properly raised below, and not our jurisdiction to hear the case." *Pershing Park*, 219 F.3d at 901, n. 3.

The Ninth Circuit issued a similar opinion in *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1995). In that case, various Indian tribes sought declaratory and injunctive relief against district attorneys who were prosecuting employees of Indian casinos. *Roache*, 54 F.3d at 537. The district court declared that federal statutes precluded county prosecutors from exercising any jurisdiction to prosecute tribal gaming officials under state law. *Roache*, 54 F.3d at 537. On appeal, the government, for the first time, challenged the standing of the Indian tribes to seek injunctive relief on behalf of the third-party individuals being prosecuted. *Roache*, 54 F.3d at 538. The Ninth Circuit found that the government had waived its standing argument, stating:

> "The State candidly admits, however, that this argument was not raised in the district court. The argument is therefore waived and we will

> not entertain it unless the defect in standing deprives us of jurisdiction for lack of a case or controversy." *Roache*, 54 F.3d at 538, *citing Barrows v. Jackson*, 346 U.S. 249 (1953).

As in *Lindley*, while the Ninth Circuit declared that the standing argument was waived, it did not hold that it was absolutely barred from considering issues of prudential standing. At most, the opinion reflects that the court chose not to address the issue. Neither prudential nor Article III standing are specifically mentioned by the court, and its analysis of the "waiver" was brief. Lastly, unlike the present case, the government did not raise standing as an issue in the lower court. Here the City did raise standing, and the district court addressed it. Pet. App., 33.

Both *Pershing Park* and *Roache* demonstrate that, at most, the issue of prudential standing may be waived. Neither opinion, however, suggests that the courts are absolutely barred from considering prudential considerations. Thus, contrary to the Association's assertion that this issue is a matter of confusion among the circuits, it is clear that all of the federal courts having considered the issue agree that courts may raise prudential standing considerations *sua sponte* in assessing their own jurisdiction. Even if none of the parties have raised prudential standing, the courts still possess discretion to address the issue.

D. The Association's contention that the district courts are better equipped than courts of appeal to address standing issues is not supported by legal authority.

The Association further contends that treating prudential standing as waivable on appeal is supported by the fact that prudential standing is a "fact-intensive" analysis that district courts are best positioned to decide. While the Association admits that Article III constitutional standing is a necessary element of the federal court's subject matter jurisdiction, it characterizes prudential standing as merely a "rule of practice." The Association is simply seeking a new rule of prudential standing carefully tailored to allow it to proceed in this case. Attempting to argue from the point-of-view of the City, the Association theorizes that responding parties might prefer to defend a challenge from an association as opposed to one brought by individual members or third-parties and that courts should respect that position. The Association believes that reviewing courts might be guilty of judicial activism when addressing prudential standing where the parties have not raised it on appeal.

The Association offers no legal support for these contentions. As stated above, standing must be satisfied at all levels of the litigation. Additionally, it is a plaintiff's burden to establish that he or she has standing to sue. *Warth v. Seldin*, 422 U.S. at 517-18. Under the Association's proposed concept of prudential standing, the parties would, by agreement or concession, dictate the court's continued jurisdiction over particular cases and thereby defeat the principles set forth in *Warth*. As

long as the defendant did not raise the issue on appeal, reviewing courts thereafter would not be able to address this aspect of their jurisdiction even in the cases where jurisdiction obviously does not exist. This result is inconsistent with the concept of prudential standing as a judicially-imposed, threshold matter meant to protect the resources of the courts and ensure the presentation of well-defined issues.

The Association offers no support for its claim that analyzing prudential standing necessarily requires "fact-intensive" analysis better suited for the district courts. There is no reason that reviewing courts should not be able to address the existence of prudential standing where, as here, it is clear from the record that the plaintiff does not have standing. There is no reason for allowing reviewing courts to continue to address Article III standing *sua sponte* but not prudential standing. Both are "threshold determinants" affecting the courts' jurisdiction. The Association's proposed rule is merely an attempt to mold the rules on prudential standing in such a way as to let it move forward.

As discussed further in section III, the Association does not identify what facts it was prevented from introducing to satisfy prudential, third-party standing here. It only claims that procedurally it was improper to take a second look at the issue. As a matter of jurisdiction, the Seventh Circuit had every right and obligation to review the issue *sua sponte*. In spite of its claims that it is the ideal advocate here, it is undisputed that the Association's challenge to the ordinance is entirely based on the interests of third-parties.

II. Having established that the court properly addressed prudential standing *sua sponte*, the Association did not then possess a due process right to file a supplemental brief on the issue.

The Association did not possess a due process right to submit a supplemental appellate brief on the issue of prudential standing. Accordingly, the Seventh Circuit's decision to deny supplemental briefing does not support Supreme Court review of this case. The Association has cited no authority suggesting that it possessed this purported due process right to "notice" and an "opportunity to present its position" on prudential standing prior to the Seventh Circuit's ruling. This was a matter of pure judicial discretion. Furthermore, even if such a right existed or the Seventh Circuit could be found to have abused its discretion, the record demonstrates that the Association was able to present its written position on standing prior to the court rendering a decision on the issue. Additional briefing on the matter would not have further enlightened the court.

A. The Association's claimed due process right to submit a brief is not supported by legal authority.

The cases relied upon by the Association are clearly distinguishable from the facts and issues presented in this case. Neither decision was based on standing or jurisdictional issues. In *Day v. McDonough*, 547 U.S. 198, 209-10 (2006), the Court held that, while a federal district court had the authority to consider, *sua sponte*, whether a state prisoner's habeas corpus petition was

filed on time, the district court was obligated to first notify the parties and to allow them to present their positions on the timeliness issue before considering dismissal on that ground. In *Burns v. The United States*, 501 U.S. 129, 138-39 (1991), the Court held that a district court could not *sua sponte* depart from the ranges imposed by statutory Sentencing Guidelines without first giving notice to the parties and allowing them the opportunity to present their positions.

Neither decision bears on the issue presented here, and the holdings were limited to the statutes and procedures presented in the respective cases. Both *Day* and *Burns* involved matters of criminal procedure, and neither of them addressed the issues of standing or jurisdiction. In fact, the Court in *Day* specifically recognized that the statute of limitations issue there did not involve a question of jurisdiction-leaving it, under the circumstances of that case, to the discretion of the district court whether to raise the matter *sua sponte*. *Day*, 547 U.S. at 205. According to the Court, once the district court raised the affirmative matter of timeliness, the *pro se* prisoner should have been given an opportunity to address the issue prior to dismissal. In *Burns*, the Court based its holding there on a matter of statutory interpretation rather than on any constitutional analysis of standing and jurisdictional matters. In fact, the Court specifically found that the "notice" and "opportunity to be heard" required in that case were mandated by rule. There was no discussion of due process concepts. The Court stated:

> "In this case, were we to read Rule 32 to dispense with notice, we would then have to

> confront the serious question whether notice in this setting is mandated by the Due Process Clause. Because Rule 32 does not clearly state that a district court *sua sponte* may depart upward from an applicable Guidelines sentencing range without providing notice to the defendant we decline to impute such an intention to Congress." *Burns*, 501 U.S. at 138.

The cases have no bearing on the Seventh Circuit's ability to raise *sua sponte* the issue of prudential standing in a civil lawsuit.

The Association can claim no surprise that the Seventh Circuit addressed the issue of standing-both Article III and prudential. Standing is an issue which the courts may address at any time. Additionally, the issue of standing was addressed by the district court. Pet. App., 33. The Association cannot point to any legal authority recognizing a due process right to supplement its appellate argument where the court raises standing on its own. It was within the court's discretion to refuse supplemental briefing on standing or any other issue.

B. The Association did have opportunities to present its position on whether it satisfied prudential standing and further briefing was unnecessary.

Lastly, even assuming the Association was entitled to file a supplemental brief or that it was an abuse of discretion to technically deny the request, the record demonstrates that the Association was able to present its position on prudential standing both before and after

the Seventh Circuit rendered its decision. On September 18, 2007, only 11 days after oral argument, and approximately 1 month prior to the Seventh Circuit's decision, the Association filed a Motion for Leave to Inform the Court of Material Developments in the District Court and to File a Supplemental Brief. Pet. App., 31. The Association attached several exhibits to the four-page motion, including the printed transcript of the oral argument on September 7. The Association's motion raised substantially the same arguments now raised in its petition for writ of *certiorari*, including the following: the City did not challenge the Association's standing on appeal and the Association therefore did not brief the issue; the Association had direct standing under *Havens Realty v. Coleman*, 455 U.S. 363 (1982); and the Association also had standing under *Singleton v. Wulff*, 428 U.S. 109 (1976). The Association sought remand to the district court to develop the factual record related to standing and/or to enter a briefing schedule allowing the parties to submit briefs addressing standing and jurisdictional issues.

Additionally, after the court rendered its decision, the Association filed a petition for rehearing and a petition for rehearing *en banc*. Pet. App., 36-37. These petitions provided the Association with additional opportunities to substantively address the issue of prudential standing. The Association, however, was not satisfied with multiple bites at the apple.

Although the Seventh Circuit ultimately did not grant the relief requested by the Association, the Association was able to present its arguments to the court through these procedures and clearly the court

did not disregard them. In his opinion, Judge Posner, directly addressed many of the Association's arguments. For example, Judge Posner carefully addressed the Association's reliance on *Lindley*, declaring that the opinion did not support the Association's absolute waiver position with respect to prudential standing. Pet. App., 13. The record indicates that additional briefing would not have further informed the court of its rights and powers with respect to prudential standing issues.

III. The Seventh Circuit correctly held that the Association did not have associational or third-party standing to bring this action on behalf of City homeowners.

The Association and its members are simply too remote to possess standing to challenge the City's ordinance. The Association contends the Seventh Circuit erred in holding that the Association lacked "associational and prudential standing" to litigate issues bearing on the constitutional rights of its "homeowner clients." According to the Association, it has satisfied the requirements for standing set forth in both *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), and *Singleton v. Wulff*, 428 U.S. 106 (1976). It claims that its "relationship" with Calumet City homeowners is sufficiently "close" to make it an effective advocate of the homeowners' due process rights and satisfy any prudential considerations. Additionally, the Association believes that the homeowners' lack of financial means and incentives is a genuine obstacle to their bringing this suit on their own behalf and further supports the Association's right to

bring this action. The Association asserts it has "superior knowledge," resources, and expertise compared to the homeowners and that "[i]ndividual homeowners, * * * cannot or do not want to be constitutional heroes challenging [the] City's Ordinance." Pet., 30.

These arguments are not proper grounds for granting the Petition. The Association is simply raising purported errors in the Seventh Circuit's factual findings or application of the law. According to Supreme Court Rule 10, such grounds are rarely the proper basis for granting a petition for writ of *certiorari*. Alternatively, the record demonstrates that the Seventh Circuit did not err in finding that the Association did not have standing and reversing the preliminary injunction. In spite of Association's broad assertions, it has not satisfied its burden of demonstrating that it has standing to challenge the City's ordinance on the constitutional grounds raised. While admitting that the homeowners may simply not want to sue the City, the Association demands the opportunity to be "constitutional heroes" on their behalf. The Association equates possession of financial resources and desire with standing. *Hunt* and *Singleton* demand much more than the ability and willingness to pay for a lawsuit. The Association's purported "relationship" with the homeowners does not meet the "closeness" requirement established by this Court, and the Association's self-proclaimed superior knowledge, resources, and expertise do not create an obstacle hindering the homeowners from bringing their own suit. There is simply no basis to overturn the Seventh Circuit's decision that the Association did not have standing to bring this litigation.

In essence, the Association argues that it, or its members, have third-party standing to bring this lawsuit on behalf of Calumet City homeowners. There is no claim that any homeowners are actually members of the Association. As recognized by the Seventh Circuit, even assuming that the Association satisfies Article III standing, it cannot satisfy the prudential considerations of third-party standing. Generally, the question of standing is directed to whether a litigant is entitled to have the court decide the merits of a dispute. *Warth*, 422 U.S. at 498. The court must assess both constitutional limitations on its jurisdiction and prudential limitations on its exercise. *Warth*, 422 U.S. at 498.

As to the constitutional dimension of standing, a plaintiff must raise an actual "case or controversy" between the parties within the meaning of Article III. *Warth*, 422 U.S. at 498. In other words, the court determines whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" to justify his or her invocation of federal-court jurisdiction and the court's exercise of its remedial power on his behalf. *Warth*, 422 U.S. at 498-99. Accordingly, the court should only invoke its jurisdiction when the plaintiff himself has suffered a threatened or actual injury from alleged illegal action. *Warth*, 422 U.S. at 499.

In addition to Article III's constitutional requirements, prudential rules of standing serve to further limit the role of the courts in resolving public disputes. *Warth*, 422 U.S. at 500. Under this analysis, the courts must generally determine whether the constitutional or statutory provision on which the

underlying claim rests is intended to grant relief to persons in the plaintiff's position. *Warth*, 500. First, claims based on alleged harm that are basically a "generalized grievance" shared in substantially equal measure by a large class of, or all, citizens does not warrant exercise of the courts' jurisdiction. *Warth*, 422 U.S. at 499. Secondly, even if a proper case and controversy is raised, a plaintiff is generally required to assert is own legal rights and interests and cannot rely on the legal rights or interests of third parties. *Warth*, 422 U.S. at 499. In applying these principles, the courts avoid attempts to decide abstract questions of general public significance. *Warth*, 422 U.S. at 500. These prudential considerations are also important because courts should not adjudicate rights unnecessarily and it is possible that holders of those rights who are not before the court do not wish to assert them. Additionally, third parties usually will be the best proponents of their own legal rights. *Singleton*, 428 U.S. at 113-14.

To establish third-party standing, the relationship between the proposed litigant and the third party whose rights he or she seeks to advance must be sufficiently close to permit the litigant to proceed. *Singleton*, 428 U.S. at 115. In assessing whether third-party standing exists, a court may consider the third party's ability to assert his or her own rights-even where the relationship between the parties is close. *Singleton*, 428 U.S. at 115-16.

In *Singleton*, the Court determined that physicians who perform abortions for their patients could appropriately raise their patients' interests in

challenging state statutes that severely restricted the types of abortions eligible for medicaid coverage. *Singleton*, 428 U.S. at 108-10. According to the Court, the statutes affected the patients' constitutionally protected right to decide to have an abortion. The patients' needs to consult and pay physicians to exercise this right made the physicians "uniquely qualified" to litigate the state's potential interference in the decision. *Singleton*, 428 U.S. at 117. Furthermore, the Court recognized that the patients faced several obstacles to bringing their own claims, including privacy concerns and the potential mootness of each individual claim due to the relatively short-lived nature of the right to obtain an abortion. *Singleton*, 428 U.S. at 117-18.

In the present case, the Association and its members cannot demonstrate the existence of a relationship with City homeowners that would satisfy the *Singleton* factors. First, there was no indication in the record that any Association members entered into a contractual relationship with City homeowners. At most the Association could only speculate that its members might be retained as brokers by future home sellers in the City. Secondly, the relationship between a homeowner and a realtor, even assuming the existence of a contract, is not the type of intimate relationship comparable to that between a patient and doctor. A patient and doctor have a private, confidential, and personal relationship that is integral to a patient's well-being. The homeowner and realtor have a limited business arrangement. Although the Association has declared that it possesses more knowledge and resources than the homeowners, there is nothing in the possible business arrangement between the two sides that would suggest that realtors

are "uniquely qualified" to litigate matters affecting persons' property interests. While realtors might generally possess more sophisticated knowledge about real estate transactions, no amount of experience or education can substitute for the personal or subjective knowledge of the homeowner.

Additionally, the only real "burden" the Association contends inhibits the homeowners from raising their own rights is money. This argument is not supported by the record and is factually presumptuous and arrogant. Such a burden is insufficient to ignore or relax the rules of prudential standing. The homeowners have options available to them for bringing such a claim regardless of their individual financial conditions. If financial hardship was a primary factor in standing considerations, then realtors, or conceivably anyone with resources ready to step in, could be found to have standing to pursue the property rights of potential clients in poor communities but not in middle-class or affluent communities. The issue of prudential standing would depend almost entirely on the individual's ability to pay and not on the relationship with the class of affected persons. This would lead to inconsistent and unworkable results.

The Association further claims that its own members' potential loss of commissions due to a decrease in home sales in the City is an injury sufficient to satisfy prudential standing concerns. As recognized by the Seventh Circuit, the Association's members do not have a constitutional right to more or greater commissions. They are relying entirely on the property rights of homeowners, and with the vast majority of the

homeowners they have no relationship, contractual or otherwise. Their purported injury is therefore speculative and remote. Judge Posner correctly noted that if the realtors' claimed decrease in commissions or business was enough to satisfy standing, then taken to its logical conclusion, such a result would permit challenges to the ordinance by countless others whose livelihood depends on the local housing industry, *e.g.*, title insurance companies, mortgage lenders, termite inspectors, moving companies, interior decorators, sellers of "for sale" signs, home buyers, *etc.* Nothing in the record suggests that the Association or its members have been injured such that they satisfy either Article III or prudential standing. The Seventh Circuit correctly held that the Association and its members do not satisfy either associational or third-party standing. Pet. App., 6.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. The City, therefore, respectfully requests that the Petition be denied.

Respectfully submitted,

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